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No. 97-1922

In the United States Supreme Court

OCTOBER TERM, 1997

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

-v.-

FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, UNITED STATES OF AMERICA,

Respondents,

UNITED TRANSPORTATION UNION, BROTHERHOOD OF SIGNALMEN and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Intervenors.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Hugh H. Welsh
Deputy General Counsel
Port Authority
Trans-Hudson Corporation
One Riverfront Plaza—Suite 327
Newark, New Jersey 07102
(212) 435-6915
Counsel of Record

Paul M. Donovan
LaRoe, Winn,
Moerman & Donovan
3506 Idaho Avenue, N.W.
Washington, D.C. 20016
(202) 362-3010

Virgil Mountain, Inc. (212) 779-4046 (L4350)

TABLE OF CONTENTS*

Page

Table of Authorities ii

Reply Brief 1

Conclusion 7

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* A Statement pursuant to Rules 14.1(b) and 29.6 of the Rules of this Court is included in the petition filed by PATH.

TABLE OF AUTHORITIES

Page

Cases Cited:

SEC v. Chenery Corp. 332 U.S. 194 (1947)..... 6

Bowen v. Georgetown University Hosp., 488 U.S. 204 (1988)..... 6

Felton v. Southeastern Pennsylvania Transp. Auth., 952 F.2d 59 (3rd Cir. 1991)..... fn.2

Chicago Transit Authority v. Flohr, 570 F.2d 1305 (7th Cir. 1977) 3, 5, 6, fn.3

Statutes Cited:

49 U.S.C. 20102(1)(A)(i)..... 2

49 U.S.C. 20102(1)(B)..... 4

Northeast Rail Service Act of 1981 (NERSA), Pub. L. No. 97-35, Sec. 1135(a)(4), 95 Stat. 646, codified at 45 U.S.C. 1104(4) fn.2

Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, Sec. 3029, 105 Stat. 2117, codified at 49 U.S.C. 5330(f) 2

Regulations Cited:

49 C.F.R. 659.5..... 2

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In its petition, PATH argued that in view of the FRA's failure to 1) isolate the statutory characteristics that make an urban rapid transit system (outside of FRA jurisdiction)

different from a "commuter or other short-haul railroad passenger service" (subject to FRA jurisdiction), and 2) apply those characteristics to PATH, the FRA had abdicated its responsibility to provide a reasoned basis for its demonstrably incorrect decision that PATH was a "railroad" within FRA jurisdiction. Accordingly, summary reversal and remand of this case to the Court of Appeals for further remand to the FRA would be appropriate.

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, Sec. 3029, 105 Stat. 2117, codified at 49 U.S.C. 5330(f), required the Federal Transit Administration (FTA) to issue regulations creating a state oversight program for "rail fixed guideway systems" which has been defined by the FTA to include "heavy or rapid rail systems". 49 C.F.R. 659.5 (App. 213). PATH alone, among rapid transit systems, continues to be the focus of FRA's assertion of jurisdiction, all others being subject to the FTA.

The government, obviously faced with a lack of rationale in the FRA's letter decision to support the agency's determination that PATH "is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction" (Pet. App. 3), only half-heartedly offers any support for the FRA's letter decision from the four corners of that document (Br. in Op. at 8). Instead, the FRA now contends that unlike other rapid transit systems which also carry commuters, simply because PATH once stated (App. 14, 163), in a different context, that it "serves primarily short-haul commuters", its operations are those Congress had in mind when it indicated that railroads within the FRA's jurisdiction included "commuter" railroads (49 U.S.C. 20102(1)(A)(i)).

The FRA's almost exclusive reliance in its Brief (at 5-6, 8) on PATH's statement that its system transports "primarily

short-haul commuters" (Pet. A.2) takes convenient and strained advantage of the statutory terms including in FRA jurisdiction a "commuter. . .service", but hardly proves its point. In fact, the government is misleading in its assertion, not repeated in the FRA's decision, that this "observation *alone* justifies the FRA's decision" (Br. in Op. at 8, emphasis supplied), for it certainly does not. As PATH noted in its petition, other rail systems transport commuters between the various States as a major component of their service — the Washington area "Metro" service operating between Washington, D.C. and suburban Virginia and Maryland is but one familiar example (Pet. n.4, App. 83)[1] — yet these systems have been acknowledged to be nonrailroad rapid transit operations. The simple fact is that the percentage of commuter patrons on a transit system was not articulated by the FRA in this determination, or in this Record, as the sole jurisdictional criteria. Leaving aside the dearth of rationale in the FRA's determination as a whole, this absence is not surprising because as stated by the Seventh Circuit in *Chicago Transit Authority v. Flohr,* 570 F.2d 1305, 1307 (7th Cir. 1977), in determining whether the FRA has safety jurisdiction, important factors are "the risks, hazards, technology, and operating procedures of. . .an urban transit

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1 The government takes PATH to task for stating in its petition that many urban transit systems carry commuters as the "bulk" of their customers as unsupported (Br. in Op. at 6, n.2). Actually, the study group findings of the Transportation Research Board summarized in PATH's Petition (at 11, n.4), indicate that "[s]everal other nonrailroads are engaged in interstate transportation of passengers: Washington Metropolitan Area Transportation Authority (WMATA). . .Bi-State Metro Link, connecting East St. Louis, Illinois, with St. Louis Missouri" and Port Authority Transit Corporation operated by the Delaware River Port Authority, the later of which the study concluded "had clearly demonstrated how an interstate rail transit line could be ruled to be a nonrailroad" (App. 83). It is certainly logical to conclude that such "nonrailroad" "transit line[s]" which operate between States are carrying commuters as the bulk of their service.

system [which are] far different from those involved in railroad operations. . ." In fact, PATH's physical and operating characteristics were the factors inventoried by the FRA in its administrative investigation of PATH (Pet. 9, n.2) and yet, but for an acknowledgment that the inventory was made (Pet. A 1-2), not analyzed in agency's final letter decision.[2]

Under the statutory scheme, only rapid transit operations "that are not connected to the general railroad system of transportation" plainly fall outside the FRA's definition of "railroad". 49 U.S.C. 20102(1)(B). Significantly, the government does not take issue with the fact that Record evidence demonstrates no such connections for PATH. The FRA does apparently make the point that "commuter railroads", with or without such connections, are within FRA jurisdiction (Br. in Op. at 5). This is certainly true, however, they once more offer no support for the FRA's determination that PATH is a "commuter" railroad other than PATH's characterization of its customer base. The FRA states that PATH apparently assumes incorrectly that the lack of such railroad connections is determinative of its jurisdictional argument. Actually, it is the FRA which would ignore the fact that PATH, in addition to showing that its facilities were not connected to the general railroad system, also presented

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2 The government also notes that the Northeast Rail Service Act of 1981 (NERSA), Pub. L. No. 97-35, Sec. 1135(a)(4), 95 Stat. 646, codified at 45 U.S.C. 1104(4) identified PATH as a "[c]ommuter authority". Actually, in requiring that Conrail divest itself of such services by January 1, 1983, NERSA authorized the transfer by Conrail of its regional and interstate commuter rail service to a number of "local transit authorities" *(Felton v. Southeastern Pennsylvania Transp. Auth.*, 952 F.2d 59, 62 (3rd Cir. 1991), including PATH. However, there is no indication in the Record that PATH actually acquired such lines or now runs such lines. In any event, commuter authorities which acquired such commuter lines did not thereby subject their separate transit operations to statutes and regulations governing commuter railroads. *Id.* at 63.

physical and operational characteristics demonstrating that it operated "rapid transit" within the meaning of the statute (Pet. 9, n.2) and that such characteristics, including, but not limited to, its lack of railroad connections, are relevant to determining whether it operates nonrailroad "rapid transit". The FRA was challenged to distinguish PATH from acknowledged rapid transit systems and failed to do so.

Finally, the government argues that there is no conflict, even in principle, between the FRA's decision in this case and the Seventh Circuit's decision in *Chicago Transit Authority v. Flohr,* 570 F.2d at 1305 which held that FRA jurisdiction does not extend to "rapid transit operations" (Br. in Op. at 6-7) Their distinction of *Flohr,* we submit, misses the point. First, the government is correct when its states that "because *Flohr* predated [1982 Congressional legislation clarifying that FRA jurisdiction extends to "commuter" railroads and excludes "rapid transit operations"], it does not address *how to draw the distinction* between those two statutory categories." (Br. In Op. at 7, emphasis supplied). Since the definition of commuter railroad at issue in this litigation, albeit a legislative clarification, came after *Flohr,* the decision could not have addressed those two statutory categories in the exact manner now before this Court. However, the important point, and one not addressed by the FRA's brief in this Court, is that the Court in *Flohr* did address the issue of what it means to be a "rapid transit operation" and what it meant to be a "railroad" and determined that the Chicago Transit Authority, which like PATH, consisted of electrically self-powered units that were substantially smaller and lighter than railroad cars that did not use the rails of any railroad, did not fall within the FRA's railroad jurisdiction. 570 F.2d at 1307.[3] While, after *Flohr,*

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3 No support is offered by the government for its statement that PATH is a "quite different system" (Br. in Op. at 7) than the Chicago system at issue in *Flohr.* The decision of the FRA certainly provides no support for this statement, and the Record compiled by the FRA

Congress clarified that some railroads, namely "commuter" railroads fell within FRA's statutory authority, it has not to this day altered the definition of rapid transit operation applied by the Court in *Flohr.*

Consequently, there is undoubtedly a *distinction to be drawn* between the two statutory categories at issue here and one which the FRA is charged with drawing. However, in this case, the FRA did not address the absolutely critical point of how it draws a distinction between commuter railroad operations in metropolitan areas and rapid transit which serves commuters in those same areas, much less provide a reasoned basis for its application of such distinction to PATH.

This is a case in which Congress has set forth the two fairly broad definitions of "rapid transit" and "railroad" (including "commuter . . . service) to guide the agency in making these jurisdictional determinations. It was incumbent on the agency to "fill in the interstices of the Act" *(Bowen v. Georgetown University Hosp.,* 488 U.S. 204, 219 (1988) (Scalia, J. concurring), *quoting, SEC v. Chenery Corp.* 332 U.S. 194, 202 (1947)) and decide this case in accordance with those statutory guidelines. The FRA did not do so, falling back instead on PATH's unidentified "unique" characteristics and PATH's failure to request a jurisdictional ruling until the present case, both poor substitutes for rational decision-making. [4]

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investigation indicates that the two systems have similar key operating and physical characteristics (Pet. 9, n.2).

4 When it turns to the FRA's decision, the government argues that since it had long treated PATH as falling within its jurisdiction, the agency's rationale need not be elaborate if reasonably discernable (Br. in Op. at 8). As we noted in our petition (at 13), PATH sought and was granted waivers from FRA requirements in the past based upon PATH's operations being rapid transit in nature. PATH's failure to request an

CONCLUSION

For these reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Hugh H. Welsh
Deputy General Counsel
Port Authority
Trans-Hudson Corporation
One Riverfront Plaza - Suite 327
Newark, New Jersey 07102
(212) 435-6915
Counsel of Record

Paul M. Donovan
LaRoe, Winn, Moerman & Donovan
3506 Idaho Avenue, N.W.
Washington, D.C. 20016
(202) 362-3010

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overall jurisdictional determination prior to this time, therefore, could not and should not deprive it of its right to a reasoned decision in this proceeding. Moreover, as already noted, the FRA, in its administrative investigation, laid the ground work for a determination of PATH's status by performing an inventory of its physical and operational characteristics and PATH's current status. Yet, its final letter determination is silent on any analysis of this endeavor.